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Supreme Court of the United States

No. ———

ATLANTIC COAST LINE RAILROAD COMPANY ET AL., PETITIONERS,

versus

G. B. JENNINGS, ADMINISTRATRIX OF THE ESTATE OF LUTHER W. CARTER, DECEASED, INTESTATE, RESPONDENT

BRIEF OF RESPONDENT

OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW

The decision of the Supreme Court of the State of South Carolina will be found on Page 247 of the record, and in 55 S. E. (2d) 522, (S. E. Reporter, Advance Sheet No. 5).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of the State of South Carolina in this case, which is contained on Pages One to Three, both inclusive, of appellants' brief, *i. e.*, that the jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257 (3) is correct, but respondents take issue with petitioners in their statement that the grounds contained in

petitioners' brief were explicitly and timely insisted upon in the Supreme Court of the State of South Carolina, or that the trial judge had the opportunity either during the trial of the case or upon the grounds presented in the motion for a new trial to pass upon the same. (Petitioners' brief, p. 2.)

It is stated in Petitioners' brief on Page Three, "The trial judge's order recited and ordered: 'All exceptions are overruled and the motions denied' ". The question here raised was first presented in Exception Nine of the Transcript of Record to the Supreme Court of the State of South Carolina (R. 232) and there abandoned in Petitioners' brief and oral argument as will hereafter appear.

STATEMENT OF CASE

This requested writ involves Fifteen Thousand ($15,000.00) Dollars awarded by the jury for punitive damages. No question is raised as to the verdict for actual damages.

Plaintiff's intestate, Mr. Carter, was killed by the collision of the automobile he was driving and a freight train of defendant on a spur or pass track at a crossing in Darlington County where the railroad tracks intersect highway No. 15-A near Society Hill, S. C. At this crossing defendant company maintained automatic lights and an automatic stop signal, so synchronized with an approaching train on this pass track as to present the unusual situation that one knowing about these signals was in greater danger than a stranger (R. 10, 40, 41, 97, 108, 110). At this crossing defendant company maintained both their main line and a spur, or pass, track, thirteen feet apart, both tracks being parallel for some distance where they crossed the highway. (Defendant's Exhibit I, R. 246 *et seq.*) The automatic revolving signal had printed on it in large letters "STOP" but was so arranged that such word was turned at right-

angles to the highway when a train was approaching. At all other times the disk on which "STOP" was printed was parallel to the highway, and could not be seen. Above this "STOP" sign, on each side of the tracks and facing approaching motorists were two signal lights that alternately flashed red, and lighted the stop sign, when, but only when, cut on by an approaching train. These signals were placed as gates or a watchman at a crossing, to warn and advise those traveling the highway as to the condition of safety or danger at the crossing. (Def's Exhibits 3B and 3E, R. 246 *et seq.*)

The two signals, that is, the alternately flashing red lights, and the revolving stop sign, were so mechanically arranged that the red lights began to flash and the revolving disk began to turn when an approaching train on the main line was 1300 feet from the crossing, but only three feet from the same crossing when an approaching train was on the pass, or spur, track on which pass or spur track was the train which killed respondents' intestate (R. 97, 108, 40, 41). The stop sign, or revolving disk, did not begin to turn until after the red light began to flash, and, of course, took a short time to so turn into a position where one approaching could see it (R. 44).

Respondents' intestate, a sober, hard and constant worker for defendant company for thirty-seven years, in good health, employed in outdoor bridge work, with good eyesight and hearing, at the time of the fatal collision was proceeding from his work near Lake City, where he had been stationed for two weeks, to his home and family during the early part of the night (R. 54, 55, 57). He was alone, driving a Chevrolet Sedan (R. 22). His way home for the past two weeks because of his wife's illness was daily over Highway No. 15-A and the intersection referred to. He accordingly knew of the signals at this crossing but not of

the veritable death trap presented by the warning signals which gave notice of a train crossing on the pass track only as one got practically on the crossing. The mechanical device as arranged, instead of giving notice of an approaching train, beckoned a traveler over the crossing until it was too late for him to possibly protect himself. The train was over four hours late (R. 93) and going at a speed of about twenty miles an hour at the time of the impact (R. 28), and Mr. Carter was traveling at about 20 or 25 miles an hour as he passed the filling station, but slowed down as he approached the crossing (R. 19). His car was under proper control (R. 19), he was on his right of the center of the road (R. 21), and as he approached the crossing, reduced his speed (R. 19) and looked and listened in both directions (R. 19). To his left, from where the train approached, was a filling station and residence, with lights on around the front (R. 26, Def's. Exhibits 2 and 3, R. 246 *et seq.*) 83 feet from the crossing (R. 68), and a cross country road between such store and the tracks of the railroad. Across the highway from this store was situated a chair factory employing a number of people, and increasing the traffic (R. 43) at this particular point. (Def's. Exhibit 1, R. 246 *et seq.*) The cross country road referred to ran by the side of the store, across the highway and on to the chair factory opposite (R. 43). The collision occurred during the early part of the night of January 20, of 1946. The lights on the approaching engine were dim or orange colored (R. 26, 34), and there was a failure of the defendant company to give the statutory signal, by either ringing the bell or blowing the whistle (R. 16, 42). The danger caused by the signal lights is made an issue by the complaint (R. 8).

The allegations of negligence which are sufficient to sustain punitive damages when supported by evidence will be found at Pages 7 through 10 of the record. For con-

venience, a portion of the testimony relative to this issue is quoted below.

(R. 97—Testimony by defendant **G. R. Mims**):

"Q. In other words about 40 feet of your engine goes over the contact switch before your light comes on?

A. Well, about 30 feet.

Q. Well, say 30 feet, so that leaves you right up there within ten feet of the pavement before the light comes on, that is right?

A. Yes.

Q. Now, your lights of that stop sign, if a traveler comes down the highway, the stop sign is turned this direction towards him or the side of it is towards him?

A. Yes.

Q. Now, it never turns until your light begins to operate, that operates by an electrical switch?

A. Yes."

* * *

(R. 108—Testimony by Petitioners' witness, **T. A. Mitchell**):

"Q. How far back from the crossing are your points of contact set on this switch line going to the brick mill?

A. Not less than twenty feet, I would say, not more than thirty.

Q. Not less than 20 or more than 30?

A. Yes.

Q. Now, on your main line it is set back, there has been testimony already but now you are the gentleman who should know, it sits backs 900 feet, is that correct?

A. It is 1300 feet and something."

* * *

(R. 40-44—Testimony of **L. C. Haselden**, former Section Master of Petitioner):

"Q. When a train is on the pass track going into the same direction or other direction, when, then, do the blinker lights get on?

A. Well, the blinker lights come on when the train is within three feet of the edge of the hard surface.

Q. That would be, you mean from about three feet from the pavement?

A. Yes.

Q. And about three feet from the crossing?

A. Yes.

Q. What causes the difference?

A. Well, there is what they call a bond wire the signal man puts on there, it is insulated, and where it is bonded it is only bonded for that short distance on the pass line, the bond is on the rail only about three feet away from the hard surface and at an angle, the highway runs at an angle, it is some distance.

Q. When you say the bond, that is a mechanical device that causes the blinker to go on?

A. Yes; that is the wire in the joint.

Q. And you say that is about thirty-three feet from the crossing?

A. Yes.

Q. Does the blinker light go on as soon as the engine hits the bond?

A. No.

Q. What causes that, what causes the blinker to go on?

A. Well, it is after the train gets on it well enough to ground it out.

Q. In other words when the train first passes over what you call the bond, that don't trip the signal immediately?

A. No.

Q. The first wheels?

A. No, that is right.

Q. And it does not trip the signal so that the blinkers go on until the train passes far enough over that bond to get the front of the engine about three feet from the crossing?

A. Yes; that is right.

Q. Where the pass track turns to the right to go to the brick mill, now I am looking at the station, first

turns to the right, how far is the pass track where it turns to the right going to the brick yard from the station at Society Hill, approximately?

A. I would say two hundred yards.

Q. The train that ran into Mr. Carter on this date was on the pass track, is that right?

A. Yes.

Q. And in going to the brick yard does that train back to the brick yard?

A. Yes; usually it does.

Q. On that particular day had it backed to the brick yard?

A. Yes.

Q. So that as it came back from the brick yard after loading it would be headed away from Society Hill?

A. Yes.

Q. On that particular day that Mr. Carter was injured at this crossing, the time you say you went up and saw him, you, I believe, at the time of the collision were in the station?

A. Yes, I was.

Q. Starting out?

A. Yes.

Q. Did you hear any bell or any whistle blow?

A. No, sir; I did not.

Q. Were you in a position where you could have heard it or would have heard it if it had blown?

A. Yes.

Q. Or rung?

A. Yes; I was.

Q. You were where you have been numerous other times when the train was coming from the pass track?

A. Yes.

Q. And were you where at other times you had heard the bell ringing and the whistle blowing?

A. Yes.

Q. And on this day you heard neither?

A. I heard neither.

Q. Now, Mr. Haselden, in coming from the depot to the crossing, is there a public road of the county that runs parallel with both the main line and the pass track?

A. Yes; there is.

Q. And does that road cross the highway just like the railroads?

A. Yes.

Q. And goes across over to the chair factory?

A. Yes.

Q. On the opposite side of the railroad is there another road also running parallel with the railroad that crosses the highway?

A. Yes, there is.

Q. And extends on both sides of the highway, of the crossing?

A. Yes.

Q. How long did you work with the railroad in and about Society Hill?

A. From July 3, 1944, until January 30, 1948.

Q. Were you familiar at the time of this collision with the mechanical device that we call the blinker light or blinker system, that they have there?

A. Yes, I was.

Q. And did you day by day constantly see them in operation?

A. I did.

Q. Now, in addition to the blinker lights, one on either side of the crossing facing both ways, was there not another round signal on which was written 'stop'?

A. Yes, there was.

Q. The stop signal was turned on when the blinker lights began to work?

A. Yes.

Q. And until the blinker lights began to work the stop signal was so you could not read it in coming along on the highway?

A. No, the stop signal was parallel with the highway.

Q. You could not read it unless—going on the highway?

A. No, not going on the highway.

Q. And it only turned as the blinker light went on and not before?

A. Yes; that is right."

* * *

(R. 16—Testimony of plaintiff's witness, **Mrs. Dalrell Odom**):

"Q. Where were you at the time of the collision?

A. Standing in front of the station.

Q. Did the train or any person on that train blow a whistle or ring a bell at any time within a distance of five hundred yards or more from that cross roads?

A. No, they did not.

Q. What is the condition of your hearing?

A. It is good.

Q. If it had blown the whistle or rung the bell would you have heard it?

A. Yes.

Q. Was there anything going on around there that would have prevented you from hearing it if it had blown the whistle or rung the bell?

A. No, sir."

* * *

(R. 26—**Mrs. Dalrell Odom**):

"Q. The engine headlight on the train was burning?

A. It was burning but it was dull color."

* * *

(R. 34—**Mrs. Dalrell Odom**):

"Q. Now Mrs. Odom, will you tell us whether or not there was a light on that train, was it after dark?

A. Yes.

Q. Was there a light on that train?

A. Yes.

Q. What was the condition of the light, or how did it appear to you?

A. It was a dim light; it was not bright.

Q. Will you tell us whether it was a white light or what color it was?

A. It was orange color."

It is submitted that the construction of the flash lights by the defendant company so as to beckon a traveler on, and then run into him with no warning whatsoever from the revolving "STOP" sign (R. 97) and only the first warning from the "RED" danger flash lights, when the train is already on the highway (R. 40), is itself positive action by the railroad company of willful and reckless conduct. When considered in the light of the failure to give the statutory signals (R. 42, 16), and of the unusual danger (a) near a factory (R. 43); (b) over a national highway with great travel (R. 15); (c) with practically no headlight on the engine (R. 26, 34); and (d) the failure of the engineer to keep a lookout for the safety of the traveling public (R. 218, 219, 221, 225), the evidence of willful and wanton conduct is exceedingly great and certainly this evidence was sufficient for the jury to decide that there was a reckless and conscious failure on the part of defendants to give the statutory signals at this railroad crossing.

SUMMARY OF ARGUMENT

Respondent will attempt to show that this Court should deny the writ of certiorari to the Supreme Court of the State of South Carolina for the reasons:

A. That the question of error on the part of the Circuit Judge in overruling defendants' motion for a directed verdict as to punitive damages on the grounds that the same was tantamount to depriving defendants of their property without due process of law and denying to them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States was not seasonably presented.

B. That petitioners in their brief admit that under the case of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, the law of the State of South Carolina is controlling and respectfully submit there was sufficient evidence to submit the question of punitive damages to the jury.

C. This Court has expressed itself as being unwilling to review cases already canvassed by two or three Courts, especially where the controlling legal principles have been recognized by the Court below, review being granted only on the basis of importance to the operation of our Federal system, the importance of the outcome to the parties not being enough.

ARGUMENT

Point I

Was Appellant's ground for writ of certiorari to the Supreme Court of the State of South Carolina, i. e., that the refusal to direct a verdict for Defendants as to punitive damages tantamount to depriving defendants of their property without due process of law and denying to them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States explicitly and timely insisted upon in the Court of Common Pleas and the Supreme Court of the State of South Carolina?

Petitioners stressed this question for the first time in their supplemental petition for re-hearing. Exception Nine (R. 232) in the Transcript of Record purports to present this to the Supreme Court of the State of South Carolina. This question was **not** presented to the trial judge either during the trial of the case or upon petitioners' motion for judgment *non obstante veredicto* or for a new trial in the alternative (R. 211).

To show that petitioners abandoned this, not only in their oral argument before the State Supreme Court, but in their written brief, we include herewith statement of questions involved and the index in petitioners' brief before the Supreme Court of the State of South Carolina. Under the law and rules applicable in the State of South Carolina where a party has not argued a matter presented by exception, it is presumed that the same has been abandoned. *American Surety Co. v. Hamrick Mills,* 4 S. E. (2d) 308 (314), 191 S. C. 362. This question was first actually presented for decision by the Supreme Court of the State of South Carolina by appellants' supplemental petition for re-hearing (R. 279-280).

There is no provision in Rule 17, Sec. 2 or any of the other rules of the Supreme Court of the State of South Carolina which allows a litigant to file a supplemental petition for a re-hearing. The reasons urged for the writ of certiorari in this case are patently of last resort. The United States Supreme Court has consistently recognized the rule that when an appellant assigns as an error that a State Court has rendered a decision repugnant to the Constitution of the United States, especially on the grounds that the decision violates the equal protection clause, that such party must explicitly raise this objection in the Court below. *Charleston Federal Savings and Loan Association, etc. v. George P. Alderson,* 89 L. Ed. 857, 324 U. S. 182.

The following are the questions and the index which appear in petitioners' brief before the Supreme Court of the State of South Carolina which conclusively shows that this question was not argued:

QUESTIONS INVOLVED

(Petitioners' brief before the Supreme Court of South Carolina)

1. Did the circuit judge err in refusing any or all of appellants' motions for nonsuit, for a directed verdict, for judgment *non obstante veredicto,* and for a new trial, based upon failure or insufficiency of proof of actionable negligence, carelessness, gross negligence, recklessness, willfullness, or wantonness?

2. Did the circuit judge err in refusing any or all of appellants' motions for nonsuit, for a directed verdict, for judgment *non obstante veredicto,* and for a new trial, based upon contributory gross negligence, carelessness, recklessness, willfullness and wantonness?

3. Did the circuit judge err in refusing appellants' motions for nonsuit and directed verdict upon the ground that plaintiff is without capacity to maintain this action?

4. Did the circuit judge err in refusing appellants' motion for a directed verdict as to punitive damages based upon insufficiency of proof of their alleged willfullness, wantonness or recklessness and was such refusal tantamount to a deprivation of appellants' property without due process of law and a denial to them of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States?

5. Did the mere alleged violation of the letter of a statute in and of itself require the submission of an issue of willfullness to the jury?

6. Did the circuit judge err in refusing appellants' motion for a new trial on the grounds (a) that the verdict was clearly against the preponderance of the evidence and (b) that the verdict was excessive?

7. Was the order of the circuit judge refusing appellants' motion for judgment *non obstante veredicto* or for a new trial in the alternative erroneous in that he thereby adjudicated vital issues of fact as if the

facts involved were undisputed, completely excluding and disregarding the preponderance of the evidence relating thereto, adduced by or on behalf of the appellants?

8. Did the circuit judge abuse his discretion in refusing to set aside the verdict of the jury in its entirety, or in not granting a new trial *nisi*, on the ground that the verdict was so excessive and unjust that it could only have been the result of caprice, passion, prejudice or other considerations not to be found in the evidence.

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Should any or all of appellant's motions for nonsuit, directed verdict, judgment *non obstante veredicto* and a new trial, based upon failure or insufficiency of evidence and upon contributory negligence, carelessness, willfullness or wantonness have been granted? 6

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Did the circuit judge err in refusing appellant's motion for a new trial on the grounds (a) that the verdict was clearly against the preponderance of the evidence and (b) that the verdict was excessive? 27

Did the circuit judge abuse his discretion in refusing to set aside the verdict of the jury in its entirety, or in not granting a new trial *nisi*, on the ground that the verdict was so excessive and unjust that it could only have been the result of caprice, passion, prejudice or other considerations not to be found in the evidence? 27

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Conclusion 39

From the foregoing, it will appear that question four was abandoned and the State Supreme Court at no time had opportunity to hear respondent's argument on the question here presented.

Point II

Was there sufficient evidence to submit the question as to punitive damages against Defendants to the Jury?

At the outset, it should be pointed out that petitioners do not disagree with the decision in the case of *Erie R. Co. v. Tompkins,* 82 L. Ed. 1188, 304 U. S. 64, stating that the requirements of this case may be put aside in the beginning, but add that "where all facts and reasonable deductions which may be drawn from them are conceded, and lead rationally to one conclusion only, it is not within the power of the State Court to reach a different conclusion based entirely upon *ipse dixit*". (Petitioners' brief, P. 11.) Petitioners also set forth in their brief that "What the Supreme Court of South Carolina has done here, therefore, is not to lay down a standard different from that erected by the general law, but to enforce such standard in the absence of any evidence to justify it". (Petitioners' brief, P. 14.)

Respondent respectfully states that all of the facts and reasonable deductions which may be drawn from the record do not lead to the conclusion that respondent was not entitled to have the issue of punitive damages submitted to the Jury, but on the contrary, under the law obtaining in the State of South Carolina and the Federal Courts, this issue could only be determined by submission to the Jury.

Following this thought, a few of the decisions of the Supreme Court of the State of South Carolina relating to crossing accidents should be pertinent.

The following is quoted from *Osteen v. So. Ry.*, 57 S. E. 196 (200), 76 S. C. 368:

> "Fourth exception: The complaint is not only for compensatory, but likewise for punitive, damages, and testimony to the effect that the defendant failed to give the signals required by statute was competent, on the ground that it was responsive to the allegations of recklessness. *Mack v. Railroad,* 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. The appellant's attorneys were granted permission to review the case of *Mack v. Railroad,* but this court adheres to the rule therein stated".

In the case of *Brogdon v. Northwestern R. Co.*, 139 S. E. 459 (461), 141 S. C. 238, the Court stated:

> "In the *McBride case,* Mr. Justice Stabler cleared up some of the confusion formerly existing in our law as to accidents occurring at railroad crossings. In that case, it was held that when a person is injured at a crossing and the railroad **failed to give the signals required by law,** that the presumption arises that the failure to give such signals was the proximate cause of the injury. Whether or not the defendant in this case gave the signals was a question of fact for the jury to determine. Evidence of the failure to give such signals not only required the circuit judge to send the case to the jury on the issue of actual damages, but also upon the issue of **punitive** damages". (Emphasis ours.)

To the same effect is *Curlee v. Southern Ry. Co.*, 115 S. E. 628, 122 S. C. 361.

The latest utterance of the Supreme Court of South Carolina on the question of punitive damages in a situation such as here presented is contained in *Cammer v. Atlantic Coast Line R. Co.*, 51 S. E. (2d) 174 (175, 177), 214 S. C. 71. There, as here, the defendant maintained lights which alternately flashed to warn travelers of the approach of trains, and also there was evidence of the failure of the railroad to give the statutory signals required of trains approaching a crossing. At the risk of repetition, we quote from that case:

> "* * * According to respondent's witnesses this engine stopped about 30 feet beyond the crossing whereupon the lights ceased to flash, which **indicated safety ahead**". (Emphasis ours.)
>
> * * *
>
> "* * * The substance of the contention there was, and here is, that the factfinding body may properly decide that a motorist may rely upon such warning signals and when they are present but not operating may take it as an assurance of safe entry upon the crossing.
>
> "Automatic warning lights and similar devices at crossings may not be soundly said to relieve one of all care save obedience to their signal. The test is, as usual, the conduct of the average, reasonably prudent person, under the existing conditions. But put there to warn of danger, when the warning ceases a resulting assumption of safety reasonably arises. This will hardly escape the jury, and should not".

We think the Trial Judge properly charged the Jury the law on the question of punitive damages, and as set forth in his order refusing the motion for a new trial, the absence of testimony of Bethea, an employee and witness of defendant, that the statutory signals were given cannot be assumed to have been due to inadvertence (R. 218, 219).

Section 8377 of the 1942 Code of Laws for the State of South Carolina, which is herein set forth, provides that upon the failure of giving the signals required by railroads at crossings shall make the corporation liable for "all damages", and the State Supreme Court, in the case of *Cole v. Blue Ridge Ry. Co.*, 75 S. C. 156, 55 S. E. 126, has held that this includes punitive damages.

Section 8377 of the 1942 Code of Laws of the State of South Carolina is as follows:

> "INJURIES AT CROSSINGS—PENALTY AND DAMAGES.—If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for **all** damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross willful negligence or unlawful act contributed to the injury". (Emphasis ours.)

The United States Supreme Court has already reviewed cases involving the crossing statutes here involved (Section 8355, petitioners' brief, Page 10, and Section 8377, Respondents' brief, Page 18), particularly in the case of *Atlantic Coast Line Railroad Company v. Katherine H. Ford*, 77 L. Ed. 457, 287 U. S. 502, and we take the liberty of quoting therefrom:

> (P. 459 L. Ed.) "This is an action brought by appellee in a South Carolina State Court of first instance against the railroad company and its engineer to recover for injuries said to have been sustained by her as the result of a collision at a public highway crossing

between an automobile in which she was riding and a passenger train of the company. The complaint alleges several grounds of negligence, but the only one necessary for our consideration is that appellants negligently failed to give the crossing signals provided for by the state law".

* * *

(P. 460 L. Ed.) "The attack upon the statute as contravening the due process clause is based upon the contention, shortly stated, that the state supreme court, by affirming the judgment, in effect construed the statute to mean that failure to give the prescribed signals is negligence *per se* and raises a presumption that such failure is the proximate cause of the collision and warrants recovery by the plaintiff without further proof, *and that such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence.* We have italicized the words which are said by appellants to constitute the crux of their contention.

"Appellants review many decisions of the state supreme court dealing with the question, which seem not to be altogether in agreement; but it is not necessary to analyze these decisions and from them attempt to extract the rule. The court below has done this and reached a conclusion contrary to that advanced by appellants; and that is enough for the purposes of our decision here. If the assailed provisions as construed and applied in the present case afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants." * * *

* * *

(P. 460 L. Ed.) "The jury, upon this subject, was instructed as follows: '* * * under that statute, it is incumbent upon the plaintiff here first to prove that the crossing signals were not given, * * * and then she must prove, and prove both by the preponderance of the evidence as I have already charged you,

that that failure to give the signals contributed to the injury of which she is complaining * * *'".

* * *

(P. 462 L. Ed.) "* * * The mere fact of such a collision, we said, 'furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause'. Moreover, the presumption was invoked to support *conflicting* allegations of negligence. Our decision in that case appropriately might have been cited here if we were considering a statute construed to mean that mere proof of collision at a crossing creates a presumption that the bell was not rung or the whistle sounded. But the rational connection between the fact proved and the fact inferred is plain enough when the proposition is put conversely, namely, that proof of failure on the part of the railroad to give the statutory signals raises a presumption that such failure is the proximate cause of the injury.

"It follows that the statutory presumption as construed by the court below is free from constitutional infirmity under the **due process clause**". (Last emphasis ours.)

"The objection that because the presumption applies only to railway companies, its effect is to deprive appellants of the equal protection of the laws is clearly untenable".

The testimony set forth in the statement of case is not here repeated, but when all of the surroundings are considered, *i. e.,* a much traveled U. S. Highway, failure of the automatic signal lights to operate until the train was on this highway, the failure to give the statutory signals, the obstructions and noises occasioned by the operation of the factory immediately adjacent, we submit that it was proper to submit the question of actual and punitive damages to the jury, and that the Supreme Court of the State

of South Carolina did not reach a conclusion based upon *ipse dixit.*

Petitioners would have the United States Supreme Court act as an appellate court in all matters decided by a state court in the same manner as a state court acts as an appellate court in cases appealed from trial courts.

We believe that under the law of the State of South Carolina and the law as announced by the United States Supreme Court, the issue of actual and punitive damages was correctly submitted to the jury, and the Supreme Court of the State of South Carolina, in upholding the trial court, did not deprive defendants of their property without due process of law, nor did the court deny defendants the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

Every consideration was given petitioners during the trial of this case; **each request to charge was granted.** The Trial Judge had the further opportunity to consider his rulings and charge upon motion for a new trial, which is the practice in this state. The Supreme Court of the State of South Carolina has passed upon this case, sustaining the same, and has further, upon petition for re-hearing, re-affirmed its decision, and although there is no provision for a supplemental petition for a re-hearing in the rules and law applicable in this State, our Supreme Court saw fit to entertain such supplemental petition and considered the question herein raised, which was then actually presented for the first time to the State Supreme Court.

The Supreme Court of the State of South Carolina, by its lengthy opinion and many months consideration, has indicated that the greatest care was observed in passing upon all questions involved, and under the law as announced by

the Supreme Court of the State of South Carolina and the United States Supreme Court, it is earnestly submitted that there is no error.

In a concurring opinion in the case of *Clyde Wilkerson v. Wilson McCarthy*, 93 L. Ed. 403, ——— U. S. ———, Mr. Justice Frankfurter had this to say:

> (P. 411 L. Ed.) "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. * * * Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough".

To the same effect is the concurring opinion of Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Chief Justice Stone in *Bailey v. Central Vermont R. Co.*, 87 L. Ed. 1444, 319 U. S. 350:

> (P. 1449 L. Ed.) "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below **recognized the controlling legal principles** but was claimed to have applied them improperly to the specific facts disclosed." * * * (Emphasis ours.)
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> (P. 1449 L. Ed.) "In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If,

in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries".

For the foregoing reasons, it is respectfully submitted that the writ of certiorari to the Supreme Court of South Carolina should be denied.

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